

**Before the
Federal Communications Commission**

In the Matter of the Appeal of)	File No. SLD - 662410
)	
the Decision of the)	
)	
Universal Service Administrator by))	
Glendale School District)	
)	CC Docket No. 02-6

PETITION FOR RECONSIDERATION

I. Since no funds were received by Glendale, there can be no recovery.

The Telecommunications Access Policy Division, Wireline Competition Bureau in DA 11-1087,¹ pursuant to delegated authority, concluded that "USAC correctly denied Glendale's request for support. The record shows that there was a time lapse of almost two years between the allowable contract date and the execution date of Glendale's contract with Windstream."

The Telecommunications Access Policy Division, Wireline Competition Bureau:

ORDERED, ***that the Universal Service Administrative Company SHALL RESCIND the funding commitments for the funding request numbers at issue and INSTITUTE recovery actions against *** Glendale School District.

In reaching this conclusion, the Telecommunications Access Policy Division, Wireline Competition Bureau, reviewed File No. SLD – 662410. That File should have revealed that Glendale received absolutely no funding

¹ Adopted: June 22, 2011

from the USAC for FRN 1929081, FCC 470 #: 8044100005012. Contrary to the Ordering clause there were no funds disbursed under this FRN, thus no funds to be recovered. Exhibit A.²

II. An Order not based on substantial evidence and states mere conjecture,³ such as, “we do not believe that a two-year time lapse is appropriate”, “it also may deter participation in the bidding process”, and “a time lapse of this length distorts the competitive bidding process” without substantial evidence⁴ is arbitrary, capricious, not in accordance with law, unwarranted by the facts, an abuse of discretion and is reversible.

⁵

² Applicant is asking that the Bureau to be more precise in its Order. A careful reading of the FCDL states that there are two FRNs and two 470s. But the Bureau's Order does not recognize this fact. The Bureau simply issued a blanket Order for recovery which could include the FRN not subject to this appeal.

³ The USAC stated that “[i]t is expected that applicants enter into a contract with a service provider in a timely manner.” Exhibit B There is nothing on the USAC's web site[has not been part of training classes] that gives notice to applicants as to what a “timely manner” means.

⁴ The Bureau has not articulated a satisfactory explanation, based on facts or any rule or regulation that would be notice to the applicant that any time lapse would be a violation of the bid process.

⁵ Pursuant to the Telecommunications Act of 1996, Glendale has a statutory right to funding absent waste, fraud or abuse, where there is no violation of an FCC rule or regulation, i.e., “[t]he ability of K-12 classrooms, *** to obtain access to advanced telecommunications services is critical to ensuring that these services are available on a universal basis. The provisions of subsection (h) [254] will help open new worlds of knowledge, learning and education to all Americans—rich and poor, rural and urban***, to Americans everywhere via schools***. Conference Report, 104th Congress, Report 104-230, pg 132

In support of its decision the Telecommunications Access Policy Division, Wireline Competition Bureau cites no evidence. It states such vague phrases like:

- “we do not believe that a two-year time lapse is appropriate”;
- “A time lapse of this length distorts the competitive bidding process”; and,
- “It also may deter participation in the bidding process”.

But there is no “evidence” [proof, confirmation, facts, substantiation, verification] cited to support its conclusion.

In other words the Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, is unsupported by substantial evidence or any evidence for that matter, and is unwarranted by the facts to the extent that the facts do not exist. It is well settled that an agency must “articulate a satisfactory explanation for its action.”

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut.

Automobile Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Here, there is no articulation of a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.* There is only speculation, e.g., it also may, we do not believe, time lapse of this length distorts the competitive bidding process. Where are the facts to support the view that time lapse of this length or any time length whatsoever distorts the competitive bidding process?

FCC decisions must be supported by substantial evidence. *Millar v. FCC*, 707 F.2d 1530, 1539-40 (D.C. Cir. 1983). Here we have guess work, no substantial evidence. As previously stated in the "Appeal," there is no rule that prohibits the Applicants actions.

The Telecommunications Access Policy Division, Wireline Competition Bureau must be reversed when, as here, "if [its] factual determinations lack substantial evidence," *Pan-Alberta Gas, Ltd. v. F.E.R.C.*, 251 F.3d 173, 176 (D.C.Cir.2001), or if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 753 (D.C. Cir.2007) **322 *1311 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). See also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)."

Neither the FCC's Form 470 Instructions, the Form 470 the USAC's web site, a rule/regulation set forth in the Code of Federal Regulations, nor any FCC Order states that a lapse of "two years" "distorts the competitive bidding process", or "also may deter participation in the

bidding process". This Commission cannot hold that the Telecommunications Access Policy Division, Wireline Competition Bureau "... could fairly and reasonably find the facts [there are no facts except a lapse of time] as it did." *Chritton v. National Transp. Safety Bd.*, 888 F. 2d 854, 856 (D.C. Cir. 1989) (construing substantial evidence test required by the Administrative Procedure Act, 5 U.S.C. § 706(2)(E)) (quoting *Western Air Line, Inc. v. CAB*, 495 F. 2d 145, 152 (D.C. Cir. 1974)). See also, *National Telephone Cooperative Association. V. FCC*, 563 F. 3d 536, 385 U.S. App. D.C. 32, which held that an Order must have factual determinations, be based on substantial evidence, and be reasonable⁶ and reasonably explained. To state that "a time lapse of almost two years" violates the bid process without substantial evidence, with no factual support that the time lapse in fact deterred **participation in the bidding process** is not in accordance with law, and is an abuse of discretion.

The Applicant is requesting that the Order of the Telecommunications Access Policy Division, Wireline Competition Bureau, be reversed for the reasons and law stated, and funding granted.

Respectfully submitted,

/S/Nathaniel Hawthorne

District of Columbia Bar No. : 237693

⁶ Reason: "to form conclusions, judgments, or inferences from facts or premises." <http://dictionary.reference.com/browse/reason>

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Attorney for Glendale

EXHIBIT A



Universal Service Administrative Company

Schools and Libraries Division

FUNDING COMMITMENT DECISION LETTER
(Funding Year 2009: 07/01/2009 - 06/30/2010)

February 9, 2010

CURRIE A. SUTTON
GLENDALE SCHOOL DISTRICT
STE 260-27600 CHAGRIN BLVD.
CLEVELAND, OH 44122-4449

Re: Form 471 Application Number: 662410
Billed Entity Number (BEN): 125595
Billed Entity FCC RN: 0011866423
Applicant's Form Identifier: GLENDALE12#1

Thank you for your Funding Year 2009 application for Universal Service Support and for any assistance you provided throughout our review. The current status of the funding request(s) in the Form 471 application cited above and featured in the Funding Commitment Report(s) (Report) at the end of this letter is as follows.

- The amount, \$10,357.38 is "Approved."
- The amount, \$8,531.91 is "Denied."

Please refer to the Report following this letter for specific funding request decisions and explanations. The Universal Service Administrative Company (USAC) is also sending this information to your service provider(s) so preparations can begin for implementing your approved discount(s) after you file FCC Form 486, Receipt of Service Confirmation Form. A guide that provides a definition for each line of the Report is available in the Reference Area of our website.

NEXT STEPS

- Work with your service provider to determine if you will receive discounted bills or if you will request reimbursement from USAC after paying your bills in full
- Review technology planning approval requirements
- Review CIPA requirements
- File Form 486
- Invoice USAC using the Form 474 (service provider) or Form 472 (Billed Entity applicant) - as products and services are being delivered and billed

TO APPEAL THIS DECISION:

You have the option of filing an appeal with the SLD or directly with the Federal Communications Commission (FCC).

If you wish to appeal a decision in this letter to USAC, your appeal must be received by USAC or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and (if available) email address for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Include the following to identify the letter and the decision you are appealing:
 - Appellant name,
 - Applicant name and service provider name, if different from appellant,
 - Applicant BEN and Service Provider Identification Number (SPIN),
 - Form 471 Application Number 662410 as assigned by USAC,
 - "Funding Commitment Decision Letter for Funding Year 2009," AND

FUNDING COMMITMENT REPORT
Billed Entity Name: GLENDALE SCHOOL DISTRICT
BEN: 125595
Funding Year: 2009

Comment on RAL corrections: The applicant did not submit any RAL corrections.

Form 471 Application Number: 662410
Funding Request Number: 1809160
Funding Status: Funded
Category of Service: Telecommunications Service
Form 470 Application Number: 776020000705919
SPIN: 143030766
Service Provider Name: Windstream Communications, Inc.
Contract Number: MTM
Billing Account Number: N/A
Multiple Billing Account Numbers: N
Service Start Date: 07/01/2009
Service End Date: 06/30/2010
Contract Award Date: N/A
Contract Expiration Date: N/A
Shared Worksheet Number: 1065077
Number of Months Recurring Service Provided in Funding Year: 12
Annual Pre-discount Amount for Eligible Recurring Charges: \$12,009.84
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$.00
Pre-discount Amount: \$12,009.84
Discount Percentage Approved by the USAC: 75%
Funding Commitment Decision: \$9,007.38 - FRN approved; modified by SLD
Funding Commitment Decision Explanation: MR1: Your request to split FRN 1809160 has been approved. Your new FRN is 1929081 and service provider is Windstream communications, Inc. <><><><><> MR2: The FRN was modified from \$2,000/mo to \$1,000.82/mo to agree with the applicant documentation. <><><><><> MR3: The establishing Form 470 Application Number was changed at the request of the applicant. <><><><><> MR4: The Contract Award Date was changed from 02/5/2007 to MTM to agree with the applicant documentation. <><><><><> MR5: The Contract Expiration Date was changed from 6/30/2012 to 6/30/2010 to agree with the applicant documentation.
FCDL Date: 02/09/2010
Wave Number: 039
Last Allowable Date for Delivery and Installation for Non-Recurring Services: 09/30/2010

FUNDING COMMITMENT REPORT
Billed Entity Name: GLENDALE SCHOOL DISTRICT
BEN: 125595
Funding Year: 2009

Comment on RAL corrections: The applicant did not submit any RAL corrections.

Form 471 Application Number: 662410
Funding Request Number: 1929081
Funding Status: Not Funded
Category of Service: Telecommunications Service
Form 470 Application Number: 804410000501012
SPIN: 143030766
Service Provider Name: Windstream Communications, Inc.
Contract Number: C
Billing Account Number: N/A
Multiple Billing Account Numbers: N
Service Start Date: 07/01/2009
Service End Date: N/A
Contract Award Date: 05/02/2006
Contract Expiration Date: 04/12/2011
Shared Worksheet Number: 1065077
Number of Months Recurring Service Provided in Funding Year: 12
Annual Pre-discount Amount for Eligible Recurring Charges: \$11,375.88
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$.00
Pre-discount Amount: \$11,375.88
Discount Percentage Approved by the USAC: 75%
Funding Commitment Decision: \$0.00 - 28 Day Waiting Period Violated
Funding Commitment Decision Explanation: MR1: This is a new FRN. It was split from
FRN 1809160. This FRN contains the following product(s)/service(s): PRI service.
<><><><> MR2: The FRN was modified from \$1,083/mo to \$947.99/mo to agree with the
applicant documentation. <><><><> DR1: Your explanation of the time lapse between
the posting date of the referenced Form 470 and the contract award date (CAD) failed
to assure USAC that you conducted a fair and competitive process and chose the most
cost-effective offering with price the primary factor.

ECDL Date: 02/09/2010

Wave Number: 039

Last Allowable Date for Delivery and Installation for Non-Recurring Services: 09/30/2010

EXHIBIT B

FAX COVER SHEET

To: Dhara Patel
Selective Reviewer

Fax: 1.973.599.6515

From: Currie A. Sutton

Date: October 26, 2009

Pages: 2 (Including Cover)

RE: Glendale School District, Selective Review Funding Year 2009,
CASE SR-2009BEN#125595

SLD Request:

FRN 1929081 is a new FRN. It was split from FRN 1809160.

You have indicated that the Contract Award Date ("CAD") for FRN 1929081 is 05/02/2006 This is more than eighteen months after the Allowable Contract Date ("ACD") of 09/22/2004 for the referenced Form 470 application # 804410000501012. It is expected that applicants enter into a contract with a service provider in a timely manner. Please respond in writing to the following questions:

1. Is the referenced Form 470 is the establishing Form 470 for this service?

 No. If no the referenced Form 470 is NOT the establishing Form 470 please provide the 15-digit Form 470 Number that did establish the bidding for this service. The establishing Form 470 is the specific Form 470, which was posted for that particular service for 28 days, and pursuant to which a contract was signed or an agreement was entered into. The establishing Form 470 could have been posted by the State, if the requested services are being purchased off of a State Master Contract.

 Yes. If Yes, the referenced Form 470 is the establishing Form 470, please proceed to the following questions

2. Is the CAD on the Form 471 correct?

 Yes. If Yes please provide a rationale summarizing the reason for this time lag.

 No. If No, please provide the correct CAD. Provide a copy of the full contract, signed by the applicant and dated, to support the funding request. Failure to provide a signed and dated contract may be cause for denial. If the contract is a State Master Contract, you do not have to submit a copy of the signed contract if that contract is available online or has already been submitted to PIA. Please provide us with the contract name and number of the State Master Contract. If you have already submitted the relevant contract information in connection with another review, please provide the Form 471 application number involved so that we can locate the documentation in our files.